

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

NATIONWIDE MUTUAL INSURANCE  
COMPANY,

Plaintiff,

v.

PUYALLUP BASKETBALL  
ACADEMY, et al.,

Defendants.

CASE NO. C15-5123 BHS

ORDER DENYING PLAINTIFF'S  
MOTION FOR DECLARATORY  
JUDGMENT

This matter comes before the Court on Plaintiff Nationwide Mutual Insurance Company's ("Nationwide") motion for declaratory judgment (Dkt. 12). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby denies the motion for the reasons stated herein.

**I. PROCEDURAL HISTORY**

On March 2, 2015, Nationwide filed a declaratory judgment action under 28 U.S.C. § 2201 against Defendants Jonnie Barr ("Mr. Barr"), Sue Barr ("Ms. Barr"), Puyallup Basketball Academy ("PBA"), and Shari Furnstahl ("Furnstahl"). Dkt. 1

1 (“Comp.”). Nationwide seeks a declaratory judgment that Nationwide does not have a  
 2 duty to defend or indemnify Mr. Barr, Ms. Barr, and PBA in the underlying lawsuit. *Id.*  
 3 ¶ 31.

4 On April 23, 2015, Nationwide filed a motion for a declaratory judgment. Dkt.  
 5 12. On May 15, 2015, Furnstahl responded. Dkt. 16. On May 18, 2015, Mr. Barr, Ms.  
 6 Barr, and PBA responded. Dkt. 18. On May 22, 2015, Nationwide replied. Dkt. 21.

## 7 **II. FACTUAL BACKGROUND**

### 8 **A. Underlying Suit**

9 Mr. Barr and Ms. Barr own PBA. Comp. ¶ 2. C.F., a minor child, attended PBA  
 10 from September 2010 to September 2011. Dkt. 13, Declaration of D. Jeffrey Burnham  
 11 (“Burnham Dec.”), Ex. 1 ¶¶ 3.2, 3.4.

12 On May 15, 2012, Mr. Barr was charged with fourth degree assault for unlawfully  
 13 and intentionally assaulting C.F. with sexual motivation. Burnham Dec., Ex. 3. On  
 14 November 4, 2013, Mr. Barr pled guilty to fourth degree assault. Burnham Dec., Ex. 4.  
 15 In his guilty plea, Mr. Barr states that “[o]n 2/1/11–12/8/11 . . . [he] assaulted another  
 16 person ([C.F.] DOB 9/13) intentionally by having unpermitted and/or offensive contact  
 17 with that person.” *Id.*

18 On April 18, 2014, Furnstahl, as guardian *ad litem* for C.F., filed suit against Mr.  
 19 Barr, Ms. Barr, and PBA in Pierce County Superior Court (“underlying suit”). Burnham  
 20 Dec., Ex. 1. Furnstahl alleges that C.F. was assaulted, unlawfully detained, and had her  
 21 privacy invaded while she was attending PBA from September 2010 to September 2011.  
 22 *Id.* ¶¶ 3.3–3.6. Furnstahl also alleges that the defendants negligently breached their duty

1 to prevent reasonably foreseeable bodily injury and assault. *Id.* ¶ 3.3. Furnstahl asserts  
 2 causes of action for “negligence, invasion of privacy, battery, assault, intentional  
 3 infliction of emotional distress, [and] false imprisonment.” *Id.* ¶ 4.2. Furnstahl seeks  
 4 damages for emotional distress, physical pain and suffering, mental pain and suffering,  
 5 medical expenses, potential lost wages, diminution of future earning capacity, and  
 6 decrease in ability to enjoy life. *Id.* ¶ 5.1.

7 On May 4, 2015, Furnstahl filed an amended complaint in the underlying suit.  
 8 Dkt. 17, Declaration of James Beck (“Beck Dec.”), Ex. J. The amended complaint  
 9 changes the applicable time period to September 2010 through 2011. *See id.* ¶¶ 3.4–3.5.  
 10 The amended complaint also alleges that the Defendants placed C.F. in a false light by  
 11 recklessly disregarding the falsity of statements. *Id.* ¶ 3.6. Furnstahl asserts the same  
 12 causes of action. *Id.* ¶ 4.2.

### 13 **B. Nationwide Policies**

14 In 2009 and 2010, Nationwide issued two insurance policies to PBA. The first  
 15 policy had a term of March 1, 2009 to March 1, 2011. Burnham Dec., Ex. 5 at 3, 13.  
 16 The second policy had a term of March 1, 2010 to March 1, 2013.<sup>1</sup> Burnham Dec., Ex. 6  
 17 at 3, 15.

18 The Nationwide policies provide general liability coverage for “sums that the  
 19 insured becomes legally obligated to pay as damages because of ‘bodily injury’ . . . to

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21 <sup>1</sup> In its motion, Nationwide states that the policies ran from December 30, 2009 through  
 22 December 30, 2011. Dkt. 12 at 3. However, the policies’ declarations pages list the dates  
 provided above. *See* Burnham Dec., Ex. 5 at 5, 13; Ex. 6 at 3, 15.

1 | which this insurance applies.” Burnham Dec., Ex. 5 at 19; Ex. 6 at 20. The policies  
2 | define “bodily injury” as “bodily injury, sickness or disease sustained by a person,  
3 | including death resulting from any of these at any time.” Burnham Dec., Ex. 5 at 30; Ex.  
4 | 6 at 31.

5 |       The policies also provide general liability coverage for “sums the insured is legally  
6 | obligated to pay as damages because of ‘personal and advertising injury’ to which this  
7 | insurance applies.” Burnham Dec., Ex. 5 at 23; Ex. 6 at 24. The policies define  
8 | “personal and advertising injury” as “injury, including consequential ‘bodily injury’  
9 | arising out of one or more of the following offenses: (a) False arrest, detention or  
10 | imprisonment; . . . (d) Oral or written publication, in any manner, of material that  
11 | slanders or libels a person . . . ; [or] (e) Oral or written publication, in any manner, of  
12 | material that violates a person’s right of privacy.” Burnham Dec., Ex. 5 at 32; Ex. 6 at  
13 | 33.

14 |       The Nationwide policies contain several exclusions that are relevant to the instant  
15 | motion. First, the policies contain an “expected or intended injury” exclusion to general  
16 | liability coverage. Burnham Dec., Ex. 5 at 20; Ex. 6 at 21. This exclusion precludes  
17 | coverage for “bodily injury . . . expected or intended from the standpoint of the insured.”  
18 | Burnham Dec., Ex. 5 at 20; Ex. 6 at 21.

19 |       The policies also include a “criminal acts” exclusion to professional liability  
20 | coverage. Burnham Dec., Ex. 5 at 50; Ex. 6 at 53. This exclusion precludes coverage for  
21 | “[a]ny liability arising out of any dishonest, fraudulent or criminal act committed by any  
22 | insured.” Burnham Dec., Ex. 5 at 50; Ex. 6 at 53.

1 Finally, the policies include an “abuse, molestation, harassment or sexual conduct”  
2 exclusion to general liability coverage. This exclusion precludes coverage for “[t]he  
3 actual, threatened, or alleged abuse, molestation, harassment or sexual conduct of any  
4 person in your care, custody and control.” Burnham Dec., Ex. 5 at 37; Ex. 6 at 41. The  
5 exclusion also precludes coverage for “[t]he negligent: (i) Employment; (ii) Investigation;  
6 (iii) Supervision, hiring or training; (iv) Reporting to the proper authorities, or failure to  
7 so report; (v) Retention; or (vii) Referral of any person for whom any insured is or ever  
8 was legally responsible and whose conduct would be excluded by [the section] above.”  
9 Burnham Dec., Ex. 5 at 37; Ex. 6 at 41.

10 Under both policies, Nationwide has “the right and duty to defend the insured  
11 against any ‘suit’ seeking” damages for bodily injury or personal and advertising injury.  
12 Burnham Dec., Ex. 5 at 19, 23; Ex. 6 at 20, 24. Nationwide does not have a “duty to  
13 defend the insured against any ‘suit’ seeking damages” for bodily injury or personal and  
14 advertising injury “to which this insurance does not apply.” Burnham Dec., Ex. 5 at 19,  
15 23; Ex. 6 at 20, 24.

### 16 **C. Reservation of Rights**

17 Mr. Barr, Ms. Barr, and PBA sought insurance coverage and defense counsel from  
18 Nationwide in the underlying suit. Comp. ¶ 14. On May 30, 2014, Nationwide agreed to  
19 defend Mr. Barr, Ms. Barr, and PBA subject to a reservation of rights. Burnham Dec.,  
20 Ex. 7. Nationwide subsequently filed this declaratory judgment action.  
21  
22

### III. DISCUSSION

Nationwide moves for a declaratory judgment on its duty to defend and duty to indemnify. Dkt. 12. However, “a party may not make a *motion* for declaratory relief[;] rather, the party must bring an *action* for a declaratory judgment.” *Kam-Ko Bio-Pharm Trading Co., Ltd-Australasia v. Mayne Pharma (USA) Inc.*, 560 F.3d 935, 943 (9th Cir. 2009) (quoting *Int’l Bhd. of Teamsters v. E. Conference of Teamsters*, 160 F.R.D. 452, 456 (S.D.N.Y. 1995)). The Court therefore construes Nationwide’s motion as a motion for summary judgment. *See id.* (“The only way plaintiffs’ motion [for a declaratory judgment] can be construed as being consistent with the Federal Rules is to construe it as a motion for summary judgment on an action for a declaratory judgment.”).

#### A. Summary Judgment Standard

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not simply “some metaphysical doubt”). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists

1 if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or  
 2 jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477  
 3 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d  
 4 626, 630 (9th Cir. 1987).

5       The determination of the existence of a material fact is often a close question. The  
 6 Court must consider the substantive evidentiary burden that the nonmoving party must  
 7 meet at trial—e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477  
 8 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual  
 9 issues of controversy in favor of the nonmoving party only when the facts specifically  
 10 attested by that party contradict facts specifically attested by the moving party. The  
 11 nonmoving party may not merely state that it will discredit the moving party’s evidence  
 12 at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W.*  
 13 *Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory,  
 14 nonspecific statements in affidavits are not sufficient, and missing facts will not be  
 15 presumed. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888–89 (1990).

## 16 **B. Insurance Policy Interpretation**

17       In Washington, the interpretation of insurance policies is a question of law. *Am.*  
 18 *Star Ins. Co. v. Grice*, 121 Wn.2d 869, 874 (1993), *opinion supplemented by* 123 Wn.2d  
 19 131 (1994). Washington courts construe insurance policies as a whole, giving force and  
 20 effect to each clause in the policy. *Id.* If the policy language is clear and unambiguous,  
 21 the Court will not modify the policy or create an ambiguity. *Id.* If the policy language is  
 22 fairly susceptible to two different reasonable interpretations, it is ambiguous, and the

1 Court may attempt to discern the parties' intent by examining extrinsic evidence. *Id.* If  
2 the policy remains ambiguous after resort to extrinsic evidence, the Court construes the  
3 ambiguities against the insurer. *Id.* at 874–75.

#### 4 **C. Nationwide's Motion**

5 Nationwide argues that it does not have a duty to defend or indemnify Mr. Barr,  
6 Ms. Barr, and PBA in the underlying suit because Furnstahl's claims are not covered by  
7 the Nationwide policies. Dkt. 12.

8 In Washington, the duty to defend is broader than the duty to indemnify. *Woo v.*  
9 *Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 52 (2007). The duty to defend arises when the  
10 "complaint contains any factual allegations which could render the insurer liable to the  
11 insured under the policy." *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 64  
12 (2000). "The key consideration in determining whether the duty to defend has been  
13 invoked is whether the allegation, if proven true, would render [the insurer] liable to pay  
14 out on the policy." *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 561 (1998). If an insurer is  
15 uncertain of its duty to defend, it may defend under a reservation of rights while seeking  
16 a declaratory judgment that coverage does not exist. *Nat'l Sur. Corp. v. Immunex Corp.*,  
17 176 Wn.2d 872, 879 (2013). An insurer defending a suit under a reservation of rights  
18 "must defend until it is clear that the claim is not covered." *Am. Best Food, Inc. v. Alea*  
19 *London, Ltd.*, 168 Wn.2d 398, 405 (2010). Meanwhile, the duty to indemnify depends on  
20 "the insured's actual liability to the claimant and actual coverage under the policy."  
21 *Hayden*, 141 Wn.2d at 64.



1 To determine whether the duty to defend exists, the Court first “examines the  
2 policy’s insuring provisions to see if the complaint’s allegations are conceivably  
3 covered.” *Id.* If the complaint’s allegations are conceivably covered, the Court “must  
4 then determine whether an exclusion clearly and unambiguously applies to bar coverage.”  
5 *Id.* Exclusionary clauses are strictly construed against the insurer. *Expedia, Inc. v.*  
6 *Steadfast Ins. Co.*, 180 Wn.2d 793, 803 (2014). The insurer bears the burden of proving  
7 that an exclusionary clause applies. *Am. Star Ins. Co. v. Grice*, 121 Wn.2d 869, 875  
8 (1993).

9 In the underlying suit, Furnstahl alleges that C.F. was assaulted and falsely  
10 imprisoned while she was in the defendants’ care from September 2010 through 2011.  
11 Beck Dec., Ex. J ¶¶ 3.3–3.6. Furnstahl asserts that the defendants negligently breached  
12 their duty to prevent reasonably foreseeable bodily injury and assault. *Id.* ¶ 3.3. She also  
13 asserts that the defendants placed C.F. in a false light by recklessly disregarding the  
14 falsity of statements. *Id.* ¶ 3.6. Furnstahl brings the following causes of action: (1)  
15 negligence; (2) invasion of privacy; (3) battery; (4) assault; (5) intentional infliction of  
16 emotional distress; and (6) false imprisonment. *Id.* ¶ 4.2.

17 Nationwide does not dispute that Furnstahl’s complaint contains claims that  
18 conceivably fall within the general liability coverage provisions of the Nationwide  
19 policies. The policies provide general liability coverage for bodily injury. Burnham  
20 Dec., Ex. 5 at 19; Ex. 6 at 20. The policies also provide general liability coverage for  
21 personal and advertising injury, which includes injury arising from false imprisonment,  
22 slander and libel, and invasion of privacy. Burnham Dec., Ex. 5 at 32; Ex. 6 at 33.

1 Instead, Nationwide argues that three exclusionary clauses preclude coverage: (1) the  
2 expected or intended injury exclusion; (2) the criminal acts exclusion; and (3) the abuse  
3 exclusion. Dkt. 12.

4 The overarching problem with Nationwide's arguments is the brevity of  
5 Furnstahl's complaint. Furnstahl's complaint contains minimal factual allegations.  
6 Moreover, Furnstahl's claims are not limited to a specific defendant, act, or occasion.  
7 Although Nationwide contends that Furnstahl's claims all flow from Mr. Barr's  
8 intentional and criminal assault of C.F., this connection is not clear from Furnstahl's  
9 complaint. For example, Furnstahl alleges that C.F. was assaulted, but Furnstahl's  
10 complaint does not reference Mr. Barr's criminal assault. Indeed, the Court is unable to  
11 determine which factual allegations, if any there are, support the assault claim. To the  
12 extent that Nationwide argues Furnstahl has not pled sufficient facts to support her  
13 claims, *see* Dkt. 21 at 8, this argument should be raised in the underlying state court suit  
14 because the Court is without jurisdiction to dismiss the underlying claims for failure to  
15 provide sufficient factual allegations.

16 With this overarching problem in mind, the Court will address each exclusionary  
17 clause in turn.

18 **1. Expected or Intended Injury Exclusion**

19 Nationwide first argues that the expected or intended injury exclusion precludes  
20 coverage. Dkt. 12 at 9. This exclusion precludes coverage for "'bodily  
21 injury' . . . expected or intended from the standpoint of the insured." *Burnham Dec., Ex.*  
22 *5* at 20; *Ex. 6* at 21. Nationwide contends that all of Furnstahl's claims stem from Mr.

1 Barr's intentional acts, and thus Nationwide may decline coverage for Mr. Barr, Ms.  
2 Barr, and PBA. Dkt. 12 at 9–11, 14–15 (citing *Farmers Ins. Co. of Wash. v. Hembree*, 54  
3 Wn. App. 195 (1989)).

4 As a preliminary matter, Nationwide's reliance on *Hembree* is misplaced. In  
5 *Hembree*, the Washington Court of Appeals examined an intentional acts exclusion that  
6 precluded coverage for bodily injury arising from the intentional acts of "an insured." 54  
7 Wn. App. at 198. The court determined that the exclusion "broadly excludes coverage  
8 for all intentionally caused injury or damage by *an* insured, which includes anyone  
9 insured under the policy." *Id.* at 200. In this case, however, the expected or intended  
10 injury exclusion precludes coverage for bodily injury that is expected or intended from  
11 the standpoint of "the insured." Burnham Dec., Ex. 5 at 20; Ex. 6 at 21. "When an  
12 insurance policy contains an exclusion for 'the insured,' each insured is entitled to read  
13 the policy as if applying only to that insured." *Truck Ins. Exch. v. BRE Props., Inc.*, 119  
14 Wn. App. 582, 591 (2003)). The expected or intended injury exclusion must therefore be  
15 applied separately to each insured.

16 With regard to whether this exclusion applies, the Court cannot conclude that it  
17 clearly and unambiguously bars coverage at this time. First, Furnstahl alleges that the  
18 defendants acted negligently. Beck Dec., Ex. J ¶¶ 3.3, 4.2. Furnstahl's negligence claim  
19 is not limited to a single defendant or occasion. Thus, liability in the underlying suit  
20 could be premised on any of the defendants' negligent acts. Nationwide recognized that  
21 negligent acts are covered under the policies in its reservation of rights letter. Burnham  
22 Dec., Ex. 7 at 5.

1        Additionally, Furnstahl alleges that the defendants falsely imprisoned C.F. and  
 2 invaded her privacy. Beck Dec., Ex. J ¶¶ 3.5–3.6, 4.2. The Nationwide policies  
 3 expressly provide coverage for personal and advertising injury arising from false  
 4 imprisonment and invasion of privacy. Burnham Dec., Ex. 5 at 32; Ex. 6 at 33. By its  
 5 plain terms, the expected or intended injury exclusion applies to bodily injury rather than  
 6 personal and advertising injury.<sup>2</sup> See Burnham Dec., Ex. 5 at 20; Ex. 6 at 21.

7        Even if the exclusion does apply to personal and advertising injury, intentional  
 8 conduct is not necessary to establish liability for invasion of privacy by false light. Under  
 9 Washington law, invasion of privacy by false light can occur if the defendant recklessly  
 10 disregarded a communication’s falsity. *Eastwood v. Cascade Broad. Co.*, 106 Wn.2d  
 11 466, 470–71 (1986). In her complaint, Furnstahl alleges that the defendants placed C.F.  
 12 in a false light by recklessly disregarding the falsity of statements. Beck Dec., Ex. J  
 13 ¶ 3.6. Thus, liability in the underlying suit could also be premised on the defendants’  
 14 reckless disregard of a communication’s falsity.

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18        <sup>2</sup> The policies include a “knowing violation” exclusion for “‘personal and advertising  
 19 injury’ caused by or at the direction of the insured with the knowledge that the act would violate  
 20 the rights of another and would inflict ‘personal and advertising injury.’” Burnham Dec., Ex. 5  
 21 at 24; Ex. 6 at 25. Nationwide relies on this specific exclusion for the first time in its reply brief.  
 22 Dkt. 21 at 6–7. “As a general rule, a movant may not raise new facts or arguments in his reply  
 brief.” *Karpenski v. Am. Gen. Life Co., LLC*, 999 F. Supp. 2d 1218, 1226 (W.D. Wash. 2014)  
 (internal quotation marks omitted). Even if the Court were to consider Nationwide’s new  
 argument, Furnstahl’s complaint alleges that the defendants acted negligently and with reckless  
 disregard. Beck Dec., Ex. J ¶¶ 3.3, 3.6, 4.2. Thus, the Court cannot conclude that this exclusion  
 clearly and unambiguously bars coverage.

1 Because Furnstahl's complaint includes claims that do not clearly and  
 2 unambiguously fall within the expected or intended injury exclusion, the exclusion does  
 3 not provide a basis for Nationwide to deny a defense in the underlying suit.

## 4 **2. Criminal Acts Exclusion**

5 Next, Nationwide contends that the criminal acts exclusion precludes coverage.  
 6 Dkt. 12 at 11–12. The exclusion states that the Nationwide policies do not apply to  
 7 “[a]ny liability arising out of any dishonest, fraudulent or criminal act committed by any  
 8 insured.” Burnham Dec., Ex. 5 at 50; Ex. 6 at 53. According to Nationwide, Furnstahl's  
 9 claims arise from Mr. Barr's criminal acts, and thus Nationwide may decline coverage.  
 10 Dkt. 12 at 11–13, 14–15 (citing *Allstate Ins. Co. v. Raynor*, 143 Wn.2d 469 (2001)).

11 To begin with, this exclusion applies to professional liability coverage rather than  
 12 general liability coverage.<sup>3</sup> Burnham Dec., Ex. 5 at 50; Ex. 6 at 53. Additionally,  
 13 Furnstahl's claims do not necessarily rely on criminal acts. As discussed above,  
 14 Furnstahl's complaint alleges conduct that is not limited to a specific defendant, act, or  
 15 occasion. Indeed, Furnstahl's complaint does not specifically reference Mr. Barr's  
 16 criminal assault. Furnstahl's complaint also alleges conduct occurring prior to the time of  
 17 Mr. Barr's criminal assault. *Compare* Beck Dec., Ex. J ¶¶ 3.4–3.5, *with* Burnham Dec.,  
 18 Ex. 4 at 6. While some of Furnstahl's claims could be construed to include Mr. Barr's

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19 <sup>3</sup> The policies include a “criminal acts” exclusion to general liability coverage for  
 20 “personal and advertising injury” arising out of a criminal act committed by or at the direction of  
 21 the insured.” Burnham Dec., Ex. 5 at 24; Ex. 6 at 25. Nationwide references this specific  
 22 exclusion for the first time in its reply brief. Dkt. 21 at 6. As previously noted, “a movant may  
 not raise new facts or arguments in his reply brief.” *Karpenski*, 999 F. Supp. 2d at 1226. For the  
 reasons discussed above, the Court cannot conclude that this exclusion clearly and  
 unambiguously bars coverage.

1 criminal assault, other claims do not invoke assault, let alone any criminal act. Because  
2 Furnstahl's complaint alleges a variety of conduct, potential liability cannot be attributed  
3 to a single act. This case is therefore distinguishable from *Raynor*, which involved a  
4 wrongful death action arising from a single, discrete criminal act. 143 Wn.2d at 474,  
5 476–77.

6 Moreover, under Washington law, “a criminal act exclusion does not apply to all  
7 acts technically classified as crimes, but only to serious criminal conduct ‘done with  
8 malicious intent, from evil nature, or with a wrongful disposition to harm or injure other  
9 persons.’” *Id.* at 478 (quoting *Van Riper v. Constitutional Gov’t League*, 1 Wn.2d 635,  
10 642 (1939)). It has not been established that any of the underlying actions involved  
11 malicious intent. For these reasons, the Court cannot conclude that the criminal acts  
12 exclusion clearly and unambiguously bars coverage in this case.

### 13 **3. Abuse Exclusion**

14 Finally, Nationwide references the abuse exclusion in its motion, but does not  
15 discuss this exclusion in detail. Dkt. 12 at 4. The abuse exclusion precludes general  
16 liability coverage for “[t]he actual, threatened, or alleged abuse, molestation, harassment  
17 or sexual conduct of any person in your care, custody and control.” Burnham Dec., Ex. 5  
18 at 37; Ex. 6 at 41. The exclusion also precludes coverage for “[t]he negligent: (i)  
19 Employment; (ii) Investigation; (iii) Supervision, hiring or training; (iv) Reporting to the  
20 proper authorities, or failure to so report; (v) Retention; or (vii) Referral of any person for  
21 whom any insured is or ever was legally responsible and whose conduct would be  
22 excluded by [the section] above.” Burnham Dec., Ex. 5 at 37; Ex. 6 at 41.

1 By its plain terms, the abuse exclusion is limited to abuse, molestation,  
2 harassment, and sexual conduct. Furnstahl's complaint, however, does not allege abuse,  
3 molestation, harassment, or sexual conduct. While Furnstahl's battery claim may be  
4 construed to include allegations of abuse, molestation, harassment, or sexual conduct, her  
5 other claims do not necessarily imply these actions. The Court cannot conclude that  
6 Furnstahl's claims are clearly and unambiguously barred by the abuse exception.

#### 7 **4. Conclusion**

8 Nationwide has not established that these exclusionary clauses preclude coverage  
9 in this case. Nationwide has a duty to defend until it is clear that the underlying claims  
10 are not covered. In regards to Nationwide's duty to indemnify, Mr. Barr, Ms. Barr, and  
11 PBA's actual liability in the underlying suit has not yet been determined. Accordingly, it  
12 is premature for the Court to decide whether Nationwide has a duty to indemnify. *See*  
13 *Hayden*, 141 Wn.2d at 64 ("The duty to indemnify hinges on the insured's actual liability  
14 to the claimant and actual coverage under the policy."). For these reasons, the Court  
15 denies Nationwide's motion.

#### 16 **IV. ORDER**

17 Therefore, it is hereby **ORDERED** that Nationwide's motion for declaratory  
18 judgment (Dkt. 12) is **DENIED without prejudice**.

19 Dated this 10th day of July, 2015.



20  
21 **BENJAMIN H. SETTLE**  
22 United States District Judge